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THE ADMINISTRATION OF JUSTICE IN JAPAN.*

PART I.

In various quarters the material has recently been furnished from which we may intelligently form an opinion upon the difficult subject of the title of this paper. What we need is, first, some information as to the methods of justice and notions of law current in the epoch before the Restoration of 1868 ; and, second, an acquaintance with what has been accomplished during the new régime of the past twenty-five years in the way of reform and systematization. We shall then be in a position to understand the conditions under which justice is now administered in that country. This subject is of more practical importance in international affairs at the present time than the modes of justice of most other nations, because of its bearing on Japan's demand for the abolition of extra-territorial jurisdiction by Western powers within her boundaries. The object of this paper, therefore, will be in particular to present as far as possible the leading considerations which should affect the propriety or impropriety of yielding to that demand, and to set forth the general facts relating to Japan's legal system, past as well as present, which will put it in the power of Western nations to form a well-grounded opinion on the question of restoring Japan's judicial autonomy.

The paper makes, therefore, no pretence at originality. It only presents in connected form what is to be found scattered in various magazines, transactions and newspapers almost inaccessible to the public. These sources, with two exceptions, own the writer of this paper as their author ; and he has welcomed this opportunity to bring together these fragments at this time so as to present, in a connected order and to a wider audience, the material for truly estimating the present conditions of law and justice in that much-misunderstood country, the *terra ignota* for jurists, Japan.

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- I. The Law of the Old Régime.
- II. The Present Codes.
- III. The Codes as a Workable System.
- IV. The Future of Extra-territorial Jurisdiction.

I. THE LAW OF THE OLD RÉGIME.

In Puchta's "Outline of the Science of Right" occur the following passages: "The relationships of Rights are the relations of one man to another, and may be called legal relations. But the various human relationships do not enter, in their full extent, into the sphere of Right, because the legal notion of a person rests upon an abstraction and does not embrace the whole being of man. There must, therefore, occur much modification and substraction before we reach the special relations which alone are involved in the idea of a Right. Thus, suppose a man has arisen from a protracted illness, and in order to pay the bill of his physician, to provide for the urgent wants of his family, due to recent incapacity, and to procure the means of beginning business again, he goes to a well-disposed neighbor, whom he has helped in former times, and obtains a loan at the usual rate. How much of all this must we not leave out in order to ascertain the purely jural relation between the parties! Compare with this the case of the rich man who raises capital merely to add to his possessions by a new speculation, and consider the effort of abstraction which is required in order to assimilate the resulting legal relations. And yet the legal relations in these two cases are identical."

For the Anglo-Saxon lawyer, accustomed as no other is to do homage to strict legal principle, as in and for itself the *summum bonum* of law, and to regard legal justice as manifesting itself only in a science of unbending rules, this quotation will indicate better than anything else, the vast gulf that is fixed between his own system and that which was indigenous to Japan. By making generalizations into hard-and-fast rules, by strictly eliminating in individual cases a variety of important moral considerations (much as certain English economists worked out their science with respect only to the

wealth-acquiring motive), the Anglo-Saxons have succeeded in creating a special type of justice. This tendency of theirs is so strong that English Equity, the one great effort to counteract it, has become in the end identical in these respects with the whole system. But there are peoples to whom this type of justice is utterly alien. Even on the Continent this impersonalization (if we may so call it) of justice has never reached such an extreme. For example, the French Civil Code has a "*délai de grâce*" which the court may accord to a debtor whose misfortunes render inequitable the immediate enforcement of a claim in its entirety (though even this has been abandoned in the new Italian Code).

But it is in Japan that we may find the extreme antithesis to the Anglo-Saxon conception of justice. Whether there is or not any practical lesson for us in studying this opposite type, is a question which we need not here take up. However this may be, the chief characteristic of Japanese justice, as distinguished from our own, may be said to be this tendency to consider all the circumstances of individual cases, to confide the relaxation of principles to judicial discretion, to balance the benefits and disadvantages of a given course, not for all time in a fixed rule, but anew in each instance, in short, to make justice personal, not impersonal. It would not be fair to infer from this that the courts of old Japan could have been no better than the tents of an Arab Sheikh, where justice came roughly and speedily, and the good sense of the tribunal was the only measure of equity. On the contrary, there was in Japan a legal system, a body of clear and consistent rules, a collection of statutes and of binding precedents. But whether it be or not a mere mark of primitive legal development, there was always the disposition to take, as Puchta puts it, "the whole being of man" into consideration, to arrange a given dispute in the most expedient way, to sacrifice legal principle to present expediency. This is the first notable characteristic. The second is that Japanese justice was essentially feudal in its spirit. At every step this quality shows itself. Chiefly affected by it, of course, was the criminal law. The common people necessarily came in for a meagre amount of respect in

the feudal polity, except as wealth-producing instruments, on whose effectiveness the subsistence of the military class depended. They were restricted and punished with a severity characteristic of feudalism everywhere. The features of their status, and the kinds of punishments, were not substantially different from those of European nations at similar stages of social development. On the civil side the result of feudalism was that the dispensing of justice between disputants appeared as a boon from the lord to his suppliant subjects. The first duty of the faithful commoner was not to disturb his lord's peace and waste his own time by becoming involved in a dispute. A litigious community was the worse of evils. An obstinate plaintiff, even with a just cause, might fare in the end not much better than the defendant.

Another consequence of the spirit of feudalism was the discouragement of appeals. Appeals there were, to be sure; but the generally indispensable ground was that of corruption, prejudice or delay on the part of the inferior judge; and it must be confessed that such appeals were dangerous for the poor peasant, for it went hard with him if he did not make out a clear case against the obnoxious judge, and the many difficulties of accomplishing this, rendered such appeals infrequent.

These being two of the noticeable features of Japanese justice, it must be remembered that none the less was there a real legal system in existence, similar in form and history to that wrought out by the Anglo-Saxon. By this is meant a body of legal notions, establishing relationships of right under given circumstances, and applied in systematic fashion by political authorities to disputes brought before the tribunals. These notions were to be found partly in statutes, partly in local customs, and partly in the precedents and practice of the courts. In the latter realm the development of these ideas by reasoning from analogy played as clear, if not as important a part as in Anglo-Saxon jurisprudence. It was, in Japan, the judges themselves who accomplished this development, not, as in some nations, an order of jurisconsults or of religious advisers. The precedents were not all in the shape of decisions directly rendered in controversies. There were, first, the

general precedents established by the Supreme Tribunal (*Hyōjo-shō*), in council assembled. The decision, however, usually took the shape of a vote upon a proposition submitted by a single judge, who was in doubt and had no precedent to guide him, or wished to change an existing rule ; for the chief members were magistrates already exercising an important original jurisdiction of their own. Secondly, judges of equal rank, but separate jurisdiction, often consulted one another on knotty cases, and agreed thereafter to follow a certain rule mutually decided on. Thirdly, a *daimyo* from a distant fief (having independent judicial powers) sometimes consulted one of the chief judges of the Central Government, the Shogunate. Fourthly, the Supreme Tribunal often passed resolutions asking the approval of the Council of State (the controlling ministry who exercised the virtual power in the Shogun's name) for certain rules, deemed to be of special importance, this approval usually following as a matter of course. Finally, there were sundry minor ways in which precedents were added, and legal ideas expanded. The Council of State sometimes consulted the Supreme Tribunal on a point of law ; and, what is still more interesting, a merchant was frequently asked to advise the tribunal as to the bearing of a commercial custom. I have said that appeals were discouraged. But these consultations of one judge with another, or of the Supreme Tribunal with one of its members, practically took the place which appeals occupy with us ; for where any really doubtful questions arose, a judge was ready enough to seek advice or put the responsibility of decision upon his superiors.

On the whole, then, while it is sometimes difficult to define the exact line at which the system of justice in a people ceases to deserve the name of jurisprudence, and is to be esteemed as merely customary or arbitrary, there can be no doubt that Japan under the old régime belonged to the higher category. Whether its national system, freed from the bond of feudalism, would have shown a capacity for development equal to some in the West, is an attractive question. But the logic of events has established Western laws here too firmly to allow us to expect ever to see an historical solution of it ;

and our present lack of knowledge makes it impossible as yet to hazard an opinion upon what might have been.

From this attempt to sketch some chief features of indigenous Japanese justice, we may pass to a few details, concerning the judges, courts, and legal methods in general.

The administration of justice was not confided to a separate governmental department (a characteristic of which European States still show strong traces), and an enumeration of the grades of administrative officials would include most of the judicial ones also. It must be noted, too, that we have to deal in reality with a number of petty states, not merely a single judicial system. Feudalism kept the country divided under a number of powerful nobles, and although these were not politically independent of the Shogun, the Viceroy of the Emperor at Yedo, the Shogun was theoretically only *primus inter pares* as regarded every matter on which he did not choose to legislate in the name of the Emperor, and thus the judicial functions of the powerful *daimyo* not friendly to the Shogun (as well, indeed, as of some others) were exercised, for the most part, quite independently. In many matters of inheritance and marriage in noble families, political reasons had induced the Shogun to legislate, and, as we shall see, the Supreme Tribunal of the Shogunate took cognizance of disputes between different federal lords and between vassals owing diverse allegiance. But in ordinary civil and criminal matters there was a practical independence varying in degree according to the influence of the fief. The immediate possessions of the Tokugawa family (in whose line the Shogunate power descended after 1603) embraced a little less than one-third of the national territory; but, as Herr Rudorff has suggested, the indirect influence of their legislation and judiciary must have been great, and one may say, speaking roughly, that Tokugawa jurisprudence was valid as a type for at least one-half the country. The first Tokugawa Shogun, Iyeyasu (1603-1616), and his grandson Iyemitsu (1632-1652) occupy, with reference to the political and legal unification of the country, a position similar to that of William I. and Henry II. in England. But they were never able to

achieve the results which the English monarchs produced, and this lack of thorough union was the most important influence in keeping the feudal spirit everywhere alive. The materials for the study of legal development in the various fiefs still lie hidden in the store-houses of the noble families ; and some slight acquaintance with the Tokugawa system is all that is at present attainable. We may be sure, however, that in this portion of the empire Japanese jurisprudence reached its highest development.

After 1650 the Tokugawa Shoguns were, for the most part, *fainéants*, and the real power lay with the Council of State (*Goroju*), the Shogun's advisers. Decrees, ordinances, and regulations emanated from this source, and reference was often made to the Council on judicial matters. But practically the highest judicial tribunal was the Chamber of Decisions (*Hyojo-sho*), finally constituted about 1634. The working members of this Supreme Tribunal were the Town Magistrate of Yedo, the Temple Magistrate, and the Magistrate of Treasury Lawsuits. Each of these in his capacity as a magistrate of original jurisdiction, dealt with special classes of litigation—the Town Magistrate with suits involving merchants of Yedo (practically all Yedo commoners) ; the Temple Magistrate, with all questions involving the priesthood, chiefly disputes over temple-lands ; and the other magistrate with all important controversies over taxes, etc., as well as with difficult cases reported for decision from the provincial officials, whose duties were primarily fiscal. But at stated times the sessions of this court were attended by one of the Council of State, and on other occasions by one of the Censors, rather by way of inspection than as a sharer in the proceedings. The Shogun himself twice a year appeared at the session. The regular sessions occurred thrice a month—on the second, twelfth, and twenty-second days, with continuances, when necessary. Besides the appellate jurisdiction, already mentioned, in case of corrupt decisions or delayed justice, the Supreme Tribune had original jurisdiction in disputes between subjects of different fiefs, between a subject of an ordinary fief and a subject of the Tokugawa dominions, between Tokugawa sub-

jects belonging to different magisterial jurisdictions, between different *daimyo*, and in cases of treason or of crimes by high officials. But the lines were not strictly drawn, and this enumeration is only substantially correct. So far as concerns the development of the law, the most important organs were this Supreme Chamber, the three magistrates (*Sambugyo*, their usual designation), and the Town Magistrates of a few other chief cities, such as Osaka, Kyoto, Nagasaki, Nara, and Sakai. When the treasures of recorded material, now stored away in these places, are brought to view, and the case-books of the various Tokugawa magistracies, as well as of the officials in the independent fiefs are properly studied, we shall know something complete and accurate in regard to the growth and conditions of law ; but as yet only the outline is distinct.

Out in the country districts all lawsuits came before the reeve, or general administrative officer (*daikwan*, *koribugyo*, etc. ; there were various titles). One of these was set over each district, the area being fixed by custom and convenience ; it might contain from fifty to one hundred villages. But at this point we begin to lose sight of anything like systematic jurisprudence. Justice becomes an administrative rather than a judicial matter. The part which precedent and rule play in settling controversies becomes less and less ; and the part of compromise and conciliation increases. When finally the initial stage of a dispute is reached, we find that the surroundings have quite changed. Justice is attained not so much by the aid of the law as by mutual consent. Customs there are, and definite ones ; but they are always applied through arbitration and concession. This feature of the jural life of the nation is not without its parallel among other Oriental peoples ; but I fancy that it is here peculiarly pronounced, and it is worth dwelling upon. I have spoken of the marked disposition to make justice personal, to let many external considerations enter into the settlement of a controversy, The exigencies of mercantile life in towns reduced this disposition to a minimum ; but it attained its greatest influence in the country. But, joined with this, perhaps even more powerful and deeper-rooted

in the character of the people, was the tendency to conciliation, to make everything smooth,—a tendency which is still, I think, the best key to much of the Japanese character. Not to attempt too much refinement of analysis, it may, perhaps, be laid down that a chief quality of that character is not so much a predominance of the emotional nature as the comparative weakness of the will. A consequent disinclination to act, a desire to avoid obstacles, to make things as easy as possible, explain many traits. The fierce determination to do, which Anglo-Saxons know so well, is wanting. The leisurely way of carrying out an undertaking, the shrinking from physical violence,—these seem to point back to the quality I have named.

The result, then, was a universal resort to arbitration and compromise as a primary means of settling disputes. It was, and to a great extent still is, an ingrained principle of the Japanese social system that every dispute should, if by any means possible, be smoothed out by resort to private or public arbitration. The machinery of local government, under the old régime, was employed for this purpose, if friendly mediation failed; but no efforts were to be spared to settle the matter in this way, and in practice the vast majority of disputes were so disposed of.

The principle of arbitration resulted thus. In case of a disagreement between members of a *kumi* (company of five neighbors, into which every town and village was divided), the five heads of families met and endeavored to settle the matter. All minor difficulties were usually ended in this way. A time was appointed for the meeting; food and wine were set out; and there was moderate eating and drinking, just as at a dinner-party. If a settlement failed, or a man repeated his offence frequently, he might be complained of to the next in authority, the chief of companies; or else the neighbors might take matters into their own hands and break off intercourse with him, refusing to recognize him socially. This usually brought him to terms. An appeal to the higher authorities was, as a rule, the practice in larger towns and cities only, where the family unity was somewhat weakened, and not in

the villages, where there was a great dislike to seeking outside coercion, and where few private disagreements went beyond the family or the *kumi*.

A case which could not be settled in this way was regarded as a disreputable one, or as indicating that the person seeking the courts wished to get some advantage by tricks. In arranging for a marriage partner for son or daughter, such families as were in the habit of using this means of redress were studiously avoided. It was a well-known fact that in those districts where the people were fond of resorting to the courts they were generally poor in consequence. The time spent and the money lost reduced the community to poverty. If even the company-chief could not settle the matter, it was laid before the higher officers, the elder and the headman. In fact, the chief village officers might almost be said to form a board of arbitration for the settlement of appeals; for in deciding the case, the headman received the suggestions of the other officers. It was discreditable for a headman not to be able to adjust a case satisfactorily, and he made all possible efforts to do so. In specially difficult matters he might ask the assistance of a neighboring headman. If the headman was unable to settle a case, it was laid before the reeve, who, however, almost invariably first sent it back, with the injunction to settle it by arbitration, putting it this time in the hands of some neighboring headman, preferably one of high reputation for probity and capacity. When a case finally came before the reeve for decision, it passed from the region of arbitration, and became a law-suit. From the reeve it might pass to the higher officials at Yedo. But even when the case finally came to the reeve's court, it was not treated in the strictly legal style familiar to us. The spirit of Japanese justice, as has been said, dictated a broader consideration of the relations of the parties. What the judge aimed at was general equity in each case. There was, of course, an important foundation of customary law and of statutes from which all parties thought as little of departing as we do from the Constitution; but these rules were applied to individual cases with an elasticity depending upon the circumstances.

Each man was supposed in theory to advocate his own cause. Nevertheless, many made a business of acting for others. But the receiving of a fee was clandestine, and ostensibly the service was rendered as a favor.

There were no court fees, before either the headman of the village, the reeve, or the magistrates. There was a large staff of clerks and assistants at every town magistrate's and reeve's office, and also in the Chamber of Judges; and to these skilled permanent officials rather than to the magistrates themselves was owed the systematic and consistent treatment of litigation.

In the towns there was always a well-organized police system. Ordinary watch duty was performed by the townsmen themselves, under regulations arranged at the ward-meetings; while the regular police were attached to the magistrate's office, and their duties were rather those of bailiffs and detectives. In the country this portion of the work, by old custom, was in the hands of one of the outcast classes, called *bantaro*, or watchmen.

As to the extent of the legislation and the jurisprudence of the Tokugawa Shogunate, it would be useless to enter into details. In the rural districts the subject-matter of ordinary legal relations hardly extended beyond land-holding, with the various methods of tenancy, land sales, marriage, inheritance, adoption, mortgages, and a few easements. The development of definite customs was limited to these general subjects. In the commercial communities legal relations were naturally more varied and more complicated. The loaning of money gave rise to a variety of distinctions and refinements, and furnished a great portion of the litigation. Sale, in all its forms, and with its attendant machinery of brokerage and credit, played an equally important part. Agency, Set-off, Carriers, Bills of Exchange, Checks, Commissions, Auctions, Damages, Penalties, Pledges,—these are some of the special topics in the recorded cases. Of course analogies to our own system and to others are plentiful. The form, however, even where the legal result is the same, is often different, the result having been reached by a different road. Thus, there existed the

ordinary transaction of deposit for safe-keeping ; but as money was often so deposited, and the privilege of loaning it was frequently given at the same time, the rule grew up that the depositary was not liable for loss by act of God (their phrase, "calamity of Heaven," ran in curious correspondence with our own), where a *res* was bailed merely for safe-keeping, while if it was money and was lent out by the bailee, under the above privilege, the bailee was responsible for it absolutely. We should have placed this obligation in the category of debts arising from loans ; but circumstances caused the Japanese to work out a similar liability through the machinery of deposit, —just as the Romans also, in the *depositum irregulare*, a similar transaction, worked out the absolute liability of an ordinary borrower of money.

One might cite a volume full of the interesting coincidences and divergences which present themselves as one studies the Japanese civil law. The purely criminal law does not have the same attraction, for one reason, because it early came under the influence of Chinese law, and never regained its independence ; for another and connected reason, because it came almost entirely from above downwards, and was not an outgrowth of the popular character ; and, finally, because its vitality was almost wholly lost when feudalism fell, and such attraction as it has is connected more with the study of social life under the Tokugawas than with that of legal development. If one were to analyze the reasons for the interest which the civil branch of the law has for the Western student, he would probably find three chief elements. First, the polar opposite-ness, as compared with the West, of the style in which Japan has contrived to work out so many traits of language and manners, leads one to wonder whether in legal relations the same spirit of contradiction has shown itself. Second, the idea of justice, as has been said, is in Japan a more flexible one than we are accustomed in Anglo-Saxon law to aim at ; and there must always be an interest in examining and comparing the results reached under these two extreme types of strictness and flexibility. Third, the legal system of Japan (on its civil side) is one of the few which have been permitted by

their environment to maintain their individuality and reach a certain stage of development in comparative isolation from other systems. The Roman was one; the Germanic was another, of which the English branch has attained to the first place. The Hindu, the Slavic, the Mohammedan, and the Chinese may also be named; and to this list it seems clear that the Japanese must be added.

John H. Wigmore.

Northwestern University,
Chicago.